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No. 00-822

IN THE
SUPREME COURT OF THE UNITED STATES

BARBARA M. KREMEN,
Petitioner,

v.

STATE OF MAINE,
Respondent.

On Petition For Writ of Certiorari to the
Supreme Judicial Court of Maine

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an officer may, during the course of a seizure for a traffic offense, question the detained motorist about crimes which are unrelated to the traffic stop and which he has no articulable basis to suspect.

2. Whether an officer may, during the course of a seizure for a traffic offense, request the detained motorist to consent to a search of her automobile where the officer has no basis to suspect any wrongdoing beyond the traffic infraction.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel before the Court in significant civil liberties cases, *e.g.*, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998), and *Good News Club v. Milford Central School*, Sup. Ct. No. 99-2036 (October 2000 Term), and have filed *amicus curiae* briefs in numerous Fourth Amendment cases, including *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Illinois v. Wardlow*, 120 S.Ct. 673 (2000), *Florida v. J.L.*, 120 S.Ct. 1375 (2000), *Indianapolis v. Edmond*, 121 S.Ct. 447 (2000) and *Ferguson v. City of Charleston*, S.Ct. No. 99-0936 (oral argument October 4, 2000). Institute attorneys currently handle several hundred civil rights cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

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[1] *Amicus curiae* The Rutherford Institute files this brief by consent of counsel for both parties. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

The Rutherford Institute supports the Petitioner's request for a writ of certiorari because it regards the case as an opportunity for the Court to clarify vital issues of Fourth Amendment jurisprudence that remain extant. The Institute recognizes that government at all levels, as well as the public as a whole, has a vital interest in the eradication of illegal activity, and particularly activity which threatens highway safety such as drug abuse. *New York v. Class*, 475 U.S. 106, 112 (1986) (citing *Delaware v. Prouse*, 440 U.S. 648, 658 (1979)). Nevertheless, the Court has a corresponding duty to resist the "hydraulic pressures" that the interests of effective law enforcement exert upon the rights of citizens, and to ensure that in seeking to further this interest, police officials continue to respect the constitutional limits of their authority. *Terry v. Ohio*, 392 U.S. 1, 60-61 (1968) (Douglas, J., dissenting). *Cf. Indianapolis v. Edmond*, 121 S. Ct. 447 (2000) (suspicionless traffic roadblocks for detecting drug activity held violative of the Fourth Amendment).

ARGUMENT

I. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE APPELLATE COURTS HAVE ENUNCIATED CONFLICTING STANDARDS FOR THE PERMISSIBLE SCOPE OF A VALID TRAFFIC STOP IN THE WAKE OF *OHIO V. ROBINETTE*, 519 U.S. 33 (1996).

The Petitioner seeks clarification of a constitutional issue that has caused both the federal Circuit Courts of appeals and state appellate courts to irreconcilably diverge:[2] whether, in the course

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[2] *See* Petition for Writ of Certiorari at 9-10 (citing court decisions in the majority) and 12 (minority decisions).

of a valid traffic seizure, when a reasonable motorist would not have felt "free to leave," *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *Terry*, 392 U.S. at 19, n.16, the investigating officer may seek to expand the scope of the purpose for the traffic seizure or its duration by requesting consent to search the vehicle. *Amicus* respectfully submits that the deep division on this issue among the courts is a result of the lack of clarification as to the meaning of the Court's limitation of an investigative stop conducted pursuant to *Terry v. Ohio*, *supra*, in "scope to the justification for [its] initation." *Terry*, 392 U.S. at 20; *see State v. Kremen*, 754 A.2d 964, 967 (Me. 2000) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). This issue was left open to interpretation following the Court's decision in *Ohio v. Robinette*, 519 U.S. 33 (1996). *See id.* at 46 (Stevens, J., dissenting) (noting that case raised two questions not decided by the Court, whether Robinette "was still being detained when the [officer questioned him], and, if so, whether that detention was unlawful"). Recently, in a similar context, in *Indianapolis v. Edmond*, the Court expressed no view on an analogous question, "whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car." 121 S.Ct. at ___, *slip op.* at 27 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (a search must be "'reasonably related in scope to the circumstances which justified the interference in the first place'" (quoting *Terry*, 392 U.S. at 20)). This case presents the Court with an opportunity to clarify whether an attempt to broaden the "scope" of a traffic seizure, whether in purpose or duration, absent reasonable suspicion of criminal activity, contravenes the rationale of *Terry* as it has been applied to automobile searches and seizures.

A. The Minority View, As Represented by the

Opinion Below, Permits Investigating Officers to Seek Expansion of the Scope of a Traffic Seizure Absent Any Cognizable Government Interest in Doing So.

This Court has held that a traffic stop constitutes a seizure for Fourth Amendment purposes, even where "the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). A traffic stop is initiated and sustained by means of an official show of force, under coercive circumstances. *See generally* George M. Dery III, *"When Will this Traffic Stop End?": The United States Supreme Court's Dodge of Every Detained Motorist's Central Concern – Ohio v. Robinette,* 25 Fla. State U. L.Rev. 519, 555 (1998) ("The very fact of a pre-existing seizure enhanced the police domination of the situation, and, therefore, increased the potency of all the other factors pointing toward the restriction of [a motorist's] liberty."). "Stopping or diverting an automobile in transit... is materially more intrusive than a question put to a passing pedestrian...." *United States v. Mendenhall*, 446 U.S. at 556-57 (opinion of Stewart, J., concurring). Even a routine traffic seizure interrupts the "freedom of movement" of the motorist and his passengers, is annoying and time-consuming, and frequently generates "substantial anxiety," even for an innocent, law-abiding motorist. *Prouse*, 440 U.S. at 657.

Because a traffic stop is accomplished by a show of authority, which authority is not dissipated unless and until, at a minimum, the subject's papers are returned and the driver is informed whether a decision to issue a citation has been made, *Florida v. Royer*, 460 U.S. 491 (1983), a motorist will ordinarily accede to official requests posed during a stop, including a request to search his

vehicle. *Cf. Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) ("Certainly few motorists would feel free to either disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so."); *see also* H. Richard Uviller, TEMPERED ZEAL 16 (1988) ("In virtually every encounter I have witnessed, the response of the person [to a police officer's approach] was docile, compliant, and respectful."). In fact, the mere request to search in the context of a traffic stop may create a presumption that the seizure continues. *Robinette*, 519 U.S. at 47 (Stevens, J., dissenting); *id.* at n. 4, citing 4 W. LaFave, SEARCH AND SEIZURE § 9.3(a), p. 112 (3d ed. 1996 and Supp. 1997) ("Given the fact that [defendant] quite clearly had been seized when his car was pulled over, the return of the credentials hardly manifests a change in status when it was immediately followed by interrogation concerning other criminal activity.").

The minority view, permitting use of a traffic stop to gain consent to search absent reasonable suspicion of criminality, flouts the central rule of *Terry* stop jurisprudence, that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)); *United States v. Brignoni-Ponce*, 422 U.S. 873; *United States v. Mendenhall*, 446 U.S. 554; *Florida v. Royer*, 460 U.S. at 500 ("The scope of the detention must be carefully tailored to its underlying justification."). "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." *Terry*, 392 U.S. at 28. The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. In reviewing police conduct in this area, the burden is upon

the state to demonstrate the reasonableness of the duration *and* scope of the search in relation to its legitimate purpose. *Id.*

It is clear that an investigatory seizure may not exceed in duration of time required to reasonably dispel the suspicion that validated its initiation. For example, the Court held in *Florida v. Royer* that an investigation that was permissible at its inception became an impermissible seizure by virtue of its extended duration and the coercive effect of taking the subject's airline tickets away, recovering his luggage and questioning him in a small, bare room. 460 U.S. at 502. *Royer* thus stands for the proposition that a restriction on a subject's ability to depart from the area within a reasonable period of time prevents the search from being reasonably limited in scope to the purposes which justified it. Similarly, in *Dunaway v. New York*, an hour-long detention of the defendant was held to be "in important respects indistinguishable from a traditional arrest," since the defendant was never informed that he was "free to go," and would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. 442 U.S. 200, 212 (1979). *Cf. United States v. Place*, 462 U.S. 696, 699 (1983) (seizure of an air passenger's baggage for the purpose of conducting a canine sniff excessive, where bags were held for ninety minutes).

The restrictive view enunciated by a bare majority of circuits, *see* Petition at 9, which interprets the permissible "scope" of an investigative traffic stop as intending the purpose of police questioning as well as its duration, is consistent with general Fourth Amendment safeguards laid down by the Court in other contexts. A search incident to a lawful arrest must be limited in scope to that which is justified by the purposes served by that exception to the warrant requirement. *Florida v.Royer* , 460 U.S. 498. Likewise,

the "hot pursuit" exception to the warrant requirement permits the warrant requirement to be abandoned in the context of probable cause to arrest a fleeing suspect, but not reasonable suspicion to interrogate. *Johnson v. United States*, 333 U.S. 10 (1948). *Cf. Arizona v. Hicks*, 480 U.S. 321 (1987) (actions of police officer in executing an otherwise lawful "exigent circumstances" search of an apartment for evidence relating to shooting incident, by moving a stereo turntable to read its serial number to ascertain whether it was stolen, "produce[d] a new invasion of [the defendant's] privacy unjustified by the exigent circumstances that validated the entry"). Even a search for weapons under *Terry* and its progeny "must be strictly circumscribed by the exigencies which justify its initation," and cannot be used to pursue a search for other evidence of criminal activity. *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979); *Sibron v. New York*, 392 U.S. 40, 65 (1968). As the Court explained in *Minnesota v. Dickerson*, 508 U.S. 366 (1993):

> [T]his Court rightly "has been sensitive to the danger... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "the sole justification of the search [under Terry:] ...the protection of the police officer and others nearby." It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize and that we have condemned in subsequent cases.

508 U.S. at 378 (citations omitted).

A reading of the permissible scope of a traffic seizure to restrict inquiry to the facts material to the purpose of the stop is reasonable in view of the fact that where no reasonable suspicion of criminality exists, authorities lack a legitimate government interest in searching the subject's vehicle. The Court has stated that "in the absence of any basis for suspecting [the defendant] of misconduct, the balance between the public interest and [defendant's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52 (1979). Police questioning of motorists regarding matters unrelated the reasons for the stop "has nothing to do with serving the purpose of the traffic stop." *Charity v. Maryland*, 132 Md. App. 598, 753 A.2d 556, 569 (2000). The interrogation is designed to elicit inconsistencies or anomalies in the answers of the driver and his or her passengers that may provide grounds to search the vehicle. *Charity*, 753 A.2d at 569; *see* Peter Verniero & Paul H. Zoubek, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING, N.J. Att'y Gen. Rep. at 17 (April 20, 1999) ("The officer may ask a series of polite questions of the driver and/or the occupant(s), inquiring as to where they are traveling from and as to their final destination. The officer in asking these 'routine' questions will be looking for discrepancies or anomalies that suggest that the occupants are lying, which might, in turn, suggest ongoing criminal activity.")[3]

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[3] The New Jersey Attorney General's report, after an extensive survey of the practice of racial profiling, which concluded that most consent searches conducted by state troopers on the New Jersey turnpike did not result in the discovery of criminal evidence. N.J. ATT'Y GEN. REP., *supra*, at 26. This finding was in spite of the fact that New Jersey does not permit officers to request consent to search a vehicle in the absence of reasonable suspicion of criminal

In view of the lack of any countervailing government interest in searching where no particularized suspicion exists, the better reasoned rule would appear to be a restriction on the permissible scope of questioning. For example, in *United States v. Pruitt*, 174 F.3d 1215 (11th Cir. 1999), the court held that police questions after the processing of a motorist's documentation such as "What do you do for a living?" and "How much money did your van cost?" were held simply irrelevant as a "fishing expedition," and hence violative of the *Terry* rationale. 174 F.3d at 1221. *See also United States v. Holt*, 229 F.3d 931 (10th 2000); *Almond v. State*, 530 S.E.2d 750, 752 (Ga. Ct. App. 2000) (if an officer, lacking reasonable suspicion, "proceeds to ask questions unrelated to the reason for the stop, the officer goes beyond the permissible scope of the investigation, and the further detention of the car driver exceeds that permitted by *Terry v. Ohio* and its progeny"); *State of Kansas v. Mitchell*, 960 P.2d 200, 265 Kan. 238 (Kan. 1998) (after motorists provides license and proof of registration, he must be allowed to proceed; "to justify a temporary detention for questioning, the officer must also have reasonable suspicion of illegal transactions in drugs or any other serious crime"). Nor does *Berkemer v. McCarty*, *supra*, suggest a different rule, since in *Berkemer*, the investigating officer had more than ample articulable facts upon which to ground a reasonable suspicion that the subject motorist was operating under the influence of alcohol or drugs. 468 U.S. at 423 (vehicle observed weaving in and out of a lane, driver failed field sobriety test).

B. Permitting Investigating Officers to Seek to Expand

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activity. *Id.* The report likewise concluded that "most arrests are for less serious offenses, and 'major' seizures of significant drug shipments are correspondingly rare." *Id.* at 33.

the Scope of a Traffic Seizure by Requesting Consent to Search from a Detained Motorist Provides Law Enforcement Authorities With a Standardless, Intrusive Investigational Tool.

The traffic stop in *Delaware v. Prouse*, a discretionary, suspicionless stop for a spot check of license and registration, was ruled unconstitutional "primarily on account of [the officer's] exercise of 'standardless and unconstrained discretion.'" *Edmond*, 121 S.Ct. at ___, *slip op.* at 13-14. *Cf. Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (traffic checkpoints for drivers under the influence of alcohol constitutionally permitted where standard procedures were in place). "[S]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Prouse*, 440 U.S. at 661 (citations omitted). Permitting searches in the absence of a reasonable suspicion that a driver is hiding contraband contravenes the Court's chief concern in *Terry* and its progeny that invasive police actions be predicated upon more than mere hunch. "The demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21, n. 18. Individualized suspicion is "necessary to ensure that police discretion is sufficiently constrained." *Whren v. United States*, 517 U.S. 806, 817-18 (1996). As the Court observed in *United States v. Martinez-Fuerte*:

> In *Brignoni-Ponce,* [the Court]... concluded there that random roving-patrol stops could not be tolerated because they "would subject the residents of... [border] areas to potentially unlimited interference with their use of the

> highways, solely at the discretion of Border Patrol officers.... There also was a grave danger that such unreviewable discretion would be abused by some officers in the field.

428 U.S. 543, 558-59 (1976), citing *Brignoni-Ponce*, 422 U.S. at 882-83.

The facts adduced at the suppression hearing in Petitioner's case are illustrative of the clear propensity of "consent" searches in traffic seizures to be borne of subtly coercive circumstances. The responding officer testified that while patrolling in uniform in his marked police cruiser, he stopped Petitioner for traveling in excess of the speed limit. Petition Appendix at 44a - 45a. (Testimony of Pierre Boucher). He promptly notified her that he would be issuing her a summons for the violation. Pet. Appx. at 45a. He ordered her to exit the vehicle, a permissible tactic in traffic seizures in the interests of officer safety. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). He directed her to sit in the police cruiser cruiser with him while he issued the citation. Pet. Appx. at 45a. Once in the cruiser, Ms. Kremen, a young woman just out of high school, was made to remain seated in the front seat of the patrol vehicle while the officer made out the citation. Pet. Appx. at 46a. It was while making out the citation, and after Ms. Kremen denied that she that anything illegal in the car, that the officer nonetheless requested consent to search the vehicle. *Id.*

As the Court was to subsequently clarify in *Knowles v. Iowa*, 525 U.S. 113 (1999), the mere citation Officer Boucher gave Ms. Kremen did not provide a constitutional basis for searching her vehicle. However, if the officer had been able to articulate facts to establish that Ms. Kremen had shown nervousness, hostility, or

furtive behavior as opposed to pleasant cooperation, the officer may then have contended he had "reasonable suspicion" on which to base a search for weapons. *Michigan v. Long*, 463 U.S. 1032 (1982). *United States v. Walden*, 146 F.3d 487, 491 (7th Cir. 1998) (questioning of motorist unrelated to broken tail light which justified the stop was held permissible because officer reasonably feared for his safety). *Cf. Illinois v. Wardlow*, 120 S.Ct. 673 (2000); *Sibron v. New York*, 392 U.S. at 66-67 ("[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*."). The circumstances presented by Petitioner's case and similar cases aptly illustrate the Hobson's choice facing drivers who are asked to "consent" to a search while undeniably within the context of a traffic seizure. An investigating officer can have it both ways; if the motorist cooperates agreeably and accedes to the request for a search, she has "consented." If she fails to cooperate or shows the stress and anxiety commonly associated with a traffic stop, *see Delaware v. Prouse*, *supra*, she may find herself under "reasonable suspicion" for illegal activity and her car may be searched for weapons. Ultimately, if police are given free reign to request "consent" to search in inherently coercive environments, vehicle searches may become the norm, rather than the exception. The grave implications of such a regime are explored below.

II. REVIEW OF THE QUESTIONS PRESENTED IN PETITIONER'S CASE IS PARTICULARLY URGENT IN LIGHT OF THE FACT THAT AUTHORITY TO PERFORM "CONSENT" SEARCHES DURING ROUTINE TRAFFIC SEIZURES HAS BEEN SHOWN TO BE SUBJECT TO ABUSE.

As the Court's *amicus* discusses above, to vest discretion to

seek an extension in the scope of a traffic seizure absent reasonable suspicion is to provide police with an investigative tool that is inherently subject to abuse. Inevitably, the burden imposed by allowing "consent" searches during traffic seizures could be expected to fall disproportionately upon minority citizens. This is borne out by real-world experiences of minorities subject to such searches:[4]

> Officers will occasionally find drugs while performing traffic stops, but more often they will not discover illegal narcotics. What this means in the real world of traffic stops is that motorists receive different treatment depending upon their skin color. If an officer does not expect to discover drugs when a white motorist is stopped for speeding, the officer is less likely to find them, which means that a white motorist will not be subjected to tactics designed to discover narcotics during a traffic stop.

Tracey Maclin, *The Fourth Amendment on the Freeway*, Rutgers Race & the Law Rev., Vol. 3, No. 2 (2001) (no page citation available).

In its seminal study of racial targeting in highway searches, the Attorney General of New Jersey found that minority motorists were disproportionately targeted for consent searches:

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[4] As Justice Stevens has noted, "We have previously considered, and rejected, [an] ivory tower analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority." *California v. Hodari*, 499 U.S. 621, 630, n.4 (1991) (dissenting).

> The data presented to us show that minority motorists were disproportionately subject to consent searches .... We have concluded, based upon our preliminary review of the allegation and information developed in a number of internal affairs investigations, as well as anecdotal accounts from interviews with state troopers, that race and ethnicity may have influenced the exercise of discretion by some officers during the course of some stops.

N.J. ATT'Y GEN. REP., *supra* at 28. Further, as Professor Maclin observes, the commonly held notion that minorities are disproportionately represented among those arrested and convicted for narcotics offenses tends to become a self-fulfilling prophecy. Maclin, *supra*. He cites the New Jersey Attorney General's report, which observed:

> The fact that the arrest rates for whites was comparatively low does not mean that white motorists are less likely to be transporting drugs, but rather that they were less likely to be suspected of being drug traffickers in the first place and, thus, less likely to be subjected to probing investigative tactics designed to confirm suspicions of criminal activity such as, notably, being asked to consent to a search.

N.J. ATT'Y GEN. REP., *supra* at 32. The Attorney General's conclusion was based upon data suggesting that the notion that minority motorists are more likely to be transporting drugs is not necessarily empirically supportable.[5] Further, a study of Maryland

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[5] The New Jersey data demonstrated that 10.5% of the searches involving white motorists resulted in an arrest or seizure of contraband, while 13.5% of searches involving African-American

state troopers suggested that the rate of drug recoveries did not substantially vary between African-American motorists and white motorists. Tracey Maclin, *Race and the Fourth Amendment*, 51 Vanderbilt L.Rev. 333, 351 (1988) (explaining that a plaintiffs' expert in a civil rights case brought against the Maryland State Police found that troopers recovered contraband from 28.4% of African-American motorists searched and from 28.8% of white motorists searched).

Where length of detention is extended by the giving of "consent," but no contraband is discovered, the impact on minority motorists may remain hidden and largely unredressable. *See* David A. Harris, *The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters,* 84 Minn. L.Rev. 265 (1999); N.J. ATT. GEN. REP., supra, at 15 ("Arrest statistics, by definition, do not show the number of persons who were detained or investigated who, as it turned out, were not found to be trafficking drugs or carrying weapons."). The *Terry* Court urged a restrictive use of investigative stops in light of the understanding of the potential impact on innocent citizens:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17. The Court went on to measure the nature and

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motorists and 38.1% of searches involving Hispanic motorists resulted in an arrest or seizure. N.J. ATT'Y GEN. REP., *supra*, at 26.

quality of the intrusion against police interest in imposing it, noting, "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24-25. Searches of personal effects in automobiles are no different in emotional impact. *See* Harris, *supra*; J. Wilgoren, "Public Profiling Debate: Acting on Experience, or on Bias," *The New York Times*, April 9, 1999 (describing experience of African-American motorists whose vehicles were searched pursuant to a "racial profile").

While is certainly true that "the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct," *Terry*, 392 U.S. at 12 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), it is equally true that "[r]egardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." 392 U.S. at 14. Such is the case where police conduct "consent" searches in the absence of articulable suspicion of illegal activity in the mere hope of pursuing a "hunch," or even of "practicing" investigative tactics at the expense of an innocent motorist. *See, e.g.*, *Ohio v. Retherford*, 639 N.E.2d 498, 505 (Ohio Ct. App. 1994) (officer declared in testimony, "all" of the cars he stopped for traffic violations would be searched, "[m]ore so for any other reason the fact that I need the practice").

In such a regime, police harassment may well take the place of proper investigation as the principle means of crime control. The

dangers of this regime are obvious:

> The right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.... There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).[6]

The social costs of such a regime are substantial. The *Terry* Court recognized these costs, and cautioned:

> Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these

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[6] One example of such a case is *Brown v. Texas* 443 U.S. 47 (1979) in which the defendant was observed in a high-crime area, stopped and patted down absent reasonable suspicion that he was armed or engaged in criminal activity. 443 U.S. 47. Ordinarily, the individual would have gone on his way, intimidated and humiliated but unable to obtain redress because the actions of the officer were not susceptible to proof that they were "shocking to the conscience" as amounting to a "deliberate indifference to" or "reckless disregard for" the subject's personal liberty. *Sacramento v. Lewis*, 523 U.S. 833 (1998). It was only because he was arrested and charged for refusing to provide his name that his case came to light, a practice the Court held violative of his right to decline to cooperate. 443 U.S. at 53.

> limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.

392 U.S. at 14-15. Recent research indicates that the "wholesale harassment" by police of minority groups has intensified in recent years. *See generally* David Cole, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (New Press, 1999) (noting that a recent poll found that nearly 90 percent of African-Americans in New York thought the police force often engaged in brutality against minorities and two-thirds said such brutality was widespread).

Numerous commentators have urged that race not play any routine role in investigative decisionmaking, for the burden of enduring intrusive police tactics almost inevitably falls upon the minority members of the community. *See, e.g.*, Randall Kennedy, RACE, CRIME, AND THE LAW 162 (1977) ("Everyone – ordinary citizens, legislators, police officials, judges, and so on – should demand that race play no routine role in decision-making regarding whom to scrutinize for purposes of law enforcement."); Cole, *supra*, at 50. Professor Cole explains, "Even where race is not an explicit factor, it will often be an unstated one, and toleration of loose, race-neutral profiles will therefore have the effect of tolerating race-based stops." *Id.* at 50-51.

In applying the strictures of the Fourth Amendment to traffic seizures, this Court has made it clear that race may not be the primary factor upon which the decision to stop or search is based. *See United States v. Brignoni-Ponce*, 422 U.S. at 885-86

(disapproving practice of stopping vehicles away from the border based solely on the apparent Mexican ancestry of occupants). Nonetheless, the approach taken by a plurality of courts after *Ohio v. Robinette*, allowing officers in their own discretion to seek to extend the scope and duration of stops by requesting "consent" to search from stopped motorists, has been shown to consistently burden minorities to a greater degree than non-minorities. In view of this, *amicus* respectfully submits that Petitioner's appeal offers an opportunity to consider whether it is appropriate in the context of this issue to exercise the diligence the Court has warned is necessary to ensure that the "very large category of presumably innocent" citizens who wish not to speak with police officers are not nonetheless subject to "virtually random seizures." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (a variety of circumstances which fell under the "drug courier profile" held insufficient to permit a stop because they encompassed a very large category of innocent travelers).

CONCLUSION

It is true that the "often competitive enterprise of ferreting out crime" requires that police have the authority to thoroughly investigate criminal activity and to disarm dangerous citizens. *Terry*, 392 U.S. at 12, quoting *Johnson v. United States*, 333 U.S. at 14. Nonetheless, it is equally true that the Supreme Court has "repeatedly decided that [the Fourth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921). "A ruling admitting evidence in a criminal trial ... has the necessary effect of *legitimizing the*

conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry*, 392 U.S. at 13 (emphasis supplied). The Court's *amicus* suggests that Petitioner's appeal is an exceptional opportunity, presented on a clear record, to review and clarify for the courts, police and the public whether an officer may seek to extend the scope and duration of a traffic seizure by requesting consent to search the vehicle without offending the Fourth Amendment.

Respectfully Submitted,

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